

Access to justice in modern legal practice – what does it mean?

TC Beirne School of Law Awards Evening

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Professor Tim Dunne – Pro Vice Chancellor

Former Chancellor, Dr John Story AO and Mrs Georgina Story

Professor Fiona Rohde – Academic Dean and Acting Head of School

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President of the Native Title Tribunal – the Hon John Dowsett AM

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Students of TCB and

Your parents, family and friends

I am honoured to have been invited to address you this evening. Those of you who have heard me speak at this event in previous years, albeit in a different capacity, will have heard me say that I regard it as the most important event in the Law School's calendar. This is because it is the occasion on which the School celebrates excellence. Excellence achieved by students – through their commitment to their academic studies and their responsibility for their own learning; excellence displayed by members of the teaching staff – without whose dedication it would be more difficult for students to achieve at the highest level; and the excellent contribution made by students and staff to community service and pro bono activities. I would like to congratulate all of you, both students and staff, who are receiving awards this evening.

I want you to reflect for a moment on what it was that drew you to the study of law. For some of you, it was no doubt your relative lack of mathematical ability that precluded entry to Med School. For others, you may have been influenced by the excitement of the criminal courts and characters such as Rake. Others may have dreamed of joining the likes of the high-flying team in Suits (even before the additional gleam of any Royal connections). Still, others amongst you might have thought that law was a profession in which you could make a positive difference to the way society operates or to the lives of others. Some of you may have already had, and by now I am sure you do have, views about what is meant by "justice". Those of you involved in the UQ Pro Bono Centre will know that the Centre's Mission includes inspiring students "to understand and value the importance of access to justice".

But what does access to justice mean? Is there a difference between a justice system and a legal system? Does a legal system pre-suppose that justice is the end goal? And what, in any event, is encompassed by notions of justice?

The pursuit of justice is a normative concept in the mind of every person who feels that he or she has been done wrong. But the application of that normative concept will vary according to individual notions of morality, including attitudes to concepts of retribution and forgiveness. By way of illustration public commentary on sentencing in this country provokes wide ranging views on what constitutes “justice” for the victims of crime. Indeed, in some jurisdictions, nothing short of the death penalty is said to achieve “justice” in certain circumstances. A system of justice is an institution for the redress of grievances. As was said by Lord Diplock in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 at 977, it can only command the respect of a society's members if they trust that it is an impartial, equal, transparent and principled system that gives effect to the rule of law.

“Access to justice”, as the phrase has come to be used, tends to focus on the “access” – the ability of a person to obtain legal assistance, to participate in the legal system, or to obtain assistance from non-legal advocacy and support. These are all essential components of a system of justice. However, I want to suggest that sometimes, by focussing solely on the “access” we may lose sight of the “justice” – and that the incentives for lawyers to think differently in such circumstances are often perverse.

Let me illustrate what I mean by reference to the rise of the class action. In March 1992, Part IVA of the *Federal Court of Australia Act 1976* introduced a federal class action regime within Australia. Its express aims were

- to enhance access to justice,
- reduce the costs of proceedings, and
- promote efficiency in the use of court resources.

To date, the cases that have been brought under the regime reflect a broad range of both commercial and non-commercial causes of action including shareholder and investor claims, anti-cartel claims, mass tort claims, consumer claims for contravention of consumer protection law and human rights claims. One of the most recent settlements is that of \$30m for the people of Palm Island in their claim against the Queensland Government arising out of the riots on the island.

Shareholder claims are, however, the most commonly filed class actions in the Federal Court. These claims are usually based on a breach of the continuous disclosure and misleading and deceptive obligations in the *Corporations Act*. As soon as a company suffers a fall in its share price, plaintiff law firms and third-party litigation funders, identify shareholders who might have suffered a loss as a result of some non-disclosure and commence a class action. One judge has recently described this as “the familiar genesis and development” of what has become the “common form” class action (Lee J in *Perera v GetSwift Ltd* [2018] FCA 732). Many

of these actions are announced as having a value of upwards of \$200m. Some have suggested a total claim value of \$1 billion.

As far as these types of class actions are concerned, none has ever gone to trial. Upon settlement, legal costs and the funders' commission are first taken from the settlement sum, before the balance is divided amongst the members of the class, the shareholders, who may number in the thousands.

Two recent settlements serve to illustrate some concerns about whether this form of class action is truly reflective of the concept of "access to justice" as was anticipated by the drafters of the original legislation. In *Clarke v Sandhurst Trustees Ltd (No 2)* [2018] FCA 511, of a settlement sum of \$16.85m, only 39% or (\$6.6m) was returned to the class – the funders commission was \$5m (30%) and the lawyers' fees (\$5.1m) (31%). In *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527, the settlement sum was \$19.25m. The class members received 27%, the lawyers 43% (\$8.27m) and the funders 30% (\$5.7m).

Now this is where individual notions of the normative concept of justice may vary. Some will say that it is better that class members receive something (even if it is less than 30 cents in the dollar) rather than nothing at all. Others might argue that a system where the transaction costs result in more than 50% of a settlement sum (or a judgment) being paid to lawyers and funders does not promote access to justice – it merely facilitates access to the legal system.

In his address to the Congress of the International Council of Commercial Arbitration last month, Chief Justice Allsop had occasion to draw attention to what he described as the "cancer of industrialisation" which is a significant issue for international commercial arbitration and which also invades the fabric of court litigation. The Chief Justice referred to the problem of "industrialisation" as leading to the incurring of large, process-driven costs and the need to recognise that commercial litigation should be a process for efficient resolution of a mutual problem.

Litigation funding (and the entrepreneurial nature of modern legal practice, particularly in the context of class actions) is an element of the industrialisation and, whilst there can be no complaint against the legitimate earning of income either from fees or funding commissions for work properly adapted to the resolution of proceedings, it is essential that the underlying integrity of those processes is maintained. This is where the incentives that necessarily imbue modern legal practice do not necessarily promote access to justice.

As you embark on the next stages of your legal education, be that at Law School or as you put your legal education to use in a variety of fields, I invite you to think critically about what access to justice really means to you, and to consider whether ideas that are said to promote access to justice do in fact do so, according to your understanding of the normative concept

of justice. I also encourage you to remember that there will be legitimate differences of opinion when you start to debate questions such as “what is justice”. There is no one approach, no “right-thinking” view (as that expression has come to be [mis]used). After all, it is only through full and frank debates on difficult social concepts and constructs, in places like universities, where educated minds are encouraged and indeed nurtured to voice the unpopular and the unfashionable views that we will edge our way closer to a system of justice that is impartial, equal, transparent and principled.